BERRY et al. *v.* BERRY'S EXECUTORS AND TRUSTEES et al.

June 8, 1916.

[89 S. E. 242.]

1. Limitation of Actions (§ 197 (2)*)—Trusts—Creation—Evidence.—On presentation of claims against the estate of decedent by his two sisters, evidence that after full settlement as executor of the estate of his father, decedent tendered to his sisters the balance due them on their share of the estate, and was told by them to keep and invest it, and did so, and executed two notes therefor, and hereafter paid the interest thereon semiannually until his death, held to show loans to which the statute of limitations applied, and not an express and continuing trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 724; Dec. Dig. § 197 (2).* 9 Va.-W. Va. Enc. Dig. 400.]

2. Trusts (§ 43 (1)*)—Creation—Evidence.—Though an express trust in either personal property or land can be created by parol, the evidence thereof must be clear and convincing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 62; Dec. Dig. § 43 (1).* 13 Va.-W. Va. Enc. Dig. 275.]

Appeal from Chancery Court of Richmond.

Suit by O. H. Berry's executors and trustees and others, in which Celeste Berry and another petitioned for allowance of claims. From a decree for complainants, petitioners appeal. Affirmed.

James Lewis Anderson and *Daniel Grinnan,* both of Richmond, for appellants.

Coke & Pickrell and *Julien Gunn,* all of Richmond, for appellees.

CHESAPEAKE & O. RY. CO. *v.* MEADOWS.

June 8, 1916.

[89 S. E. 244.]

1. Master and Servant (§ 274 (8)*)—Injuries—Evidence—Contributory Negligence.—In action by a railroad fireman under federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) for injuries from striking a caboose insufficiently clearing, where the defense that plaintiff's failure to maintain his required lookout caused the injury was combated by his evidence that a defective mechanical stoker required his attention at

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

the time, supporting evidence by his witnesses that such stokers were defective, held admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 948; Dec. Dig. § 274 (8).* 9 Va.-W. Va. Enc. Dig. 724.]

2. Master and Servant (§ 297 (1)*)—Injury to Servant—Verdict—Special Interrogatories—Federal Employers' Liability Act.—In such action it was not error to refuse to direct the jury to return a special verdict of the ultimate facts found as to defendant's negligence, plaintiff's damages, assumption of risk, and contributory negligence, and the proportion of contributory negligence to the combined negligence of both.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1195; Dec. Dig. § 297 (1).* 13 Va.-W. Va. Enc. Dig. 624.]

3. Master and Servant (§ 250¼*)—New, vol. 15 Key-No. Series—Injuries to Servant—Actions—Federal Employers' Liability Act.—Where Congress gave the state courts co-ordinate jurisdiction with federal courts in cases under the federal Employers' Liability Act, by necessary implication it adopted the procedure and practice of the state courts in trials by them of such cases.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 718.*]

4. Damages (§ 100*)—Elements—Injuries to Servant—"Diminished Earning Power."—In action under federal Employers' Liability Act, a proper element of damages for personal injury is compensation for plaintiff's being unable, because of his injury, to follow such calling or business as he otherwise could have followed; this not being different from compensation for "diminished earning power."

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 237-241; Dec. Dig. § 100.* 4 Va.-W. Va. Enc. Dig. 189.]

5. Master and Servant (§ 296 (12)*)—Injuries—Action—Instruction—Applicability.—In action under federal Employers' Liability Act for injuries to plaintiff railroad firemen from striking a caboose insufficiently clearing, where the defense that plaintiff's failure to maintain his required lookout caused the injury was combated by his evidence that defective mechanical stoker required his attention at the time, an instruction held to correctly cover the defense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1189; Dec. Dig. § 296 (12).* 7 Va.-W. Va. Enc. Dig. 717.]

6. Master and Servant (§ 289 (19)*)—Injuries—Action—Question for Jury—Assumption of Risk.—In such action, upon evidence of plaintiff's previous knowledge of conditions in the yard where the accident occurred, the question of plaintiff's assumption of risk was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1110; Dec. Dig. § 289 (19).* 9 Va.-W. Va. Enc. Dig. 726.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

7. Master and Servant (§ 280*)—Injuries—Action—Question for Jury—Assumption of Risk.—In such case, evidence that plaintiff did not and could not know of the location of the caboose, and that the track was signaled "clear," held not to show assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.* 9 Va.-W. Va. Enc. Dig. 726.]

8. Master and Servant (§ 206, 217 (1)*)—Injuries—Action—Question for Jury—Assumption of Risk.—A servant assumes all the ordinary, usual, and normal risks of the business after the master has used reasonable care for his protection, and also all such other risks as he knows of, or which were so unquestionably plain and clear that he must have known of their existence and their danger to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 574; Dec. Dig. § 206, 217 (1).* 9 Va.-W. Va. Enc. Dig. 693.]

Error to Circuit Court of City of Clifton Forge.

Action by J. W. Meadows against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Perry, of Staunton, for plaintiff in error. Affirmed.
O. B. Harvey, of Clifton Forge, for defendant in error.

NEW MARKET & SPERRYVILLE TURNPIKE CO. *v.* KEYSER, Commonwealth's Atty., et al.

June 8, 1916.

[89 S. E. 251.]

1. Turnpikes and Toll Roads (§ 3*)—Statutory Provisions.—The act approved March 21, 1914 (Acts 1914, c. 162), amending and re-enacting the act approved January 18, 1904 (Acts 1902-04, c. 609, subc. 10, § 8), did not by implication repeal in toto the act relating to turnpike companies approved March 17, 1906 (Acts 1906, c. 297), but amended it in certain particulars.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent Dig. § 4; Dec. Dig. § 3.* 13 Va.-W. Va. Enc. Dig. 378.]

2. Statutes (§ 158*)—Repeal by Implication.—Repeals by implication are not favored, the presumption being against the intention to repeal where express terms are not used or the later statute does not amend the former.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.* 12 Va.-W. Va. Enc. Dig. 780.]

3. Turnpikes and Toll Roads (§ 31*)—Action to Forfeit Franchise—Statutes.—Under Acts 1906, c. 297, providing for hearing of a turn-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.